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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 384

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee under St. Louis Southwestern Railway Com-
pany First Terminal and Unifying Mortgage dated Jan-
uary 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis South-
western Railway Company, Debtor, ST. LOUIS
SOUTHWESTERN RAILWAY COMPANY, and
SOUTHERN PACIFIC COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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February 7, 1939.

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Railway Company First Terminal and Uni-
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Petitioner,

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No. 384

BERRYMAN HENWOOD, Trustee of St. Louis
Southwestern Railway Company, Debtor,
ST. LOUIS SOUTHWESTERN RAILWAY COM-
PANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

The respondents' briefs endeavor to support the de-
cision below both by the Joint Resolution of June 5, 1933,
which was the basis of the decision, and by resort to three
other arguments which were not considered or relied upon
by the Courts below.¹

**A. As to the Effect of the Unexercised Gold
Clause Option in the Bonds.**

**1. The Result Arrived at upon Respondents' Construc-
tion of the Joint Resolution Stretches and Distorts It to the
Point of Absurdity.**

The respondents' construction of the Joint Resolution
has the following consequences.

¹Brief of respondent Henwood, pages 66, 96-136.

(a) It seeks to obtain the discharge of all multiple currency obligations containing a dollar clause upon the payment or tender of United States legal tender currency in disregard of the obligee's expressed right to discard the dollar alternative and elect a foreign currency alternative and *in abrogation* of such right of election. The theory is that extreme and literal compliance is to be exacted with every word of the second sentence of clause (a) of the Resolution, to the extent of the fullest meaning of every word, without restriction or limitation of any sort whether derived from the context, from the preamble, or from the legislative purpose as expressed in the debates and committee reports of Congress.²

(b) The effect of this construction would be to destroy perfectly innocent commodity alternative contracts, as illustrated at pages 96-7 of our main brief. The promisor's undertaking to deliver "a hundred dollars or a horse" at the promisee's election would fall within the inclusive sweep of respondents' argument, despite the absence of a gold clause and despite the difficulty of conceiving a horse as money. For the second sentence is read by respondents to command the discharge of the entire "obligation" upon payment of the dollar alternative, and the "obligation" is said to be the entire instrument with all its complex of duties, and it was "payable" in a particular kind of coin or currency of the United States in the sense that there was the *legal possibility* of discharge in such currency. Thus the unfortunate promisee is obliged to take the hun-

²Which, so far as appears, were concerned only with the supply of *monetary gold* in this country and with its relation to *United States currency*.

dred dollars and cannot get the horse because giving him the horse would impose an unreasonable obstruction upon the power of Congress to regulate the currency!

Obviously the argument proves too much. It is unnecessarily destructive of established property rights in no way involved with the regulation of the currency. The respondents recognize this. They say that contracts with a primary commodity alternative would not fall within the Joint Resolution.³ But the alternative contract supposed is not primarily a commodity contract. It is equally a money contract. Petitioner in Nos. 590 and 591 argues that the most casual reading of the second sentence shows it to deal only with "payment",⁴ apparently contending (although the argument is not developed) that the promisee's election of the horse in the case supposed would not be a taking of payment, *i. e.*, that the contract after the election would not be a money contract. But obviously before election of the horse the contract would be "payable" in dollars, in the contingent sense urged by petitioner in Nos. 590 and 591 and by respondents here. If so "payable", it would upon the construction urged be stripped of the option clause and of all alternatives but the dollar clause. Furthermore it is clear that the commodity alternative in a money contract does not deprive it of its character as such, since notes may be made payable in specific articles and the delivery of such an article pursuant to the note is payment. *Roberts v. Beatty*, 2 Penrose & Watts 63, 21 Am. Dec. 410 (Pennsylvania 1830); *Bailey v. Simonds*, 6 N. H. 159, 25 Am. Dec. 454 (1833); *Wyman v. Winslow*,

³Henwood brief, page 94; Southern Pacific brief, page 24.

⁴Brief of petitioner Bethlehem Steel Co., page 28, note 11.

11 Me. 398, 26 Am. Dec. 542 (1834); *Dunman v. Strother*, 1 Tex. 89, 46 Am. Dec. 97 (1846); *Paynie v. Couch*, 1 G. Greene 64, 46 Am. Dec. 497 (Iowa 1847); *Cole v. Ross*, 9 B. Monroe 393, 50 Am. Dec. 517 (Kentucky 1856).

(c) Respondents' construction destroys the right of election reserved to the promisee in an option contract. In most cases, as with the bonds here involved, this is a valuable right, carefully worked out and deliberately reserved. Ordinarily it would be such as a court of law might be expected strictly to enforce. *Paradine v. Jane*, Aleyn 26 (1648). This Court is asked to find as a matter of law that Congress intended to abrogate a valuable right of this character by language which nowhere mentions options or alternative contracts, adopted to meet an emergency with which such instruments had no connection, as a result of deliberations in which they were not named or considered. See *Ozawa v. United States*, 260 U. S. 178, 194. While the construction of the Joint Resolution urged by respondents is defended in the present instance as necessary to reach a foreign currency alternative contracted for as the equivalent of a dollar gold clause in 1912, yet that construction is necessarily so broad and sweeping as to strike down many contract rights having no relation and no equivalence to gold values.

(d) Respondents' contentions involve the further absurd result that in some readily conceivable situations they would deprive the debtor of a contractual option to discharge his debt in a depreciated currency. Suppose a contract to pay a designated sum at the option of the obligor either in dollars in the United States or in a number of francs corresponding to the dollar amount at the exchange

equivalent of 1912. If the debt matured in 1936, the obligor would desire to discharge it in depreciated francs. It would be to his advantage to do so, and the right to do so was one which formed an essential consideration in the original bargain. Nevertheless upon respondents' extreme construction the entire instrument must be discharged by payment in dollars, and the debtor, whom it is asserted Congress desired to benefit, is actually penalized. There was no evidence before Congress at the time of the adoption of the Joint Resolution, as to the exact amount or nature of multiple currency contracts that might be claimed to be affected by its language. Is it to be conceived that Congress "advisedly employed" the "sweeping language"⁵ of the Resolution so as to strike down all kinds of contract rights, not definitely envisaged, which might well have included rights of the kind supposed above? Is it not rather to be conceived that Congress by the language of the second sentence of clause (a) intended merely to regulate the payment of matured and enforceable obligations coming to be paid in American money, and confine the scope of its currency regulation to American currency and its metallic base?

(e) Respondents' construction further presupposes a discrimination silently made by Congress between two indistinguishable groups of American debtors required to make payments abroad in foreign currency. See at pages 25-27 below.

These unreasonable results Congress is supposed to have accomplished silently, without mention thereof in any debate or committee report, under cover of United States

⁵Brief of petitioner in Nos. 590 and 591, page 38.

currency regulation, and without employment of any words specially adapted to the end desired. The unreasonableness of the results flowing from respondents' construction is in itself cogent indication that that construction is wrong.⁹ What is the reasoning upon which respondents have arrived at these astonishing results?

2. Respondents' Construction of the Joint Resolution Is Untenable.

Respondents here and petitioner in Nos. 590 and 591 rely for their conclusions upon a few central contentions. These are:

(a) The contention that the dollar alternative is primary in the obligations of respondent St. Louis Southwestern Railway Company.

This argument appears to be the foundation of the brief of Southern Pacific Company herein (p. 8). It is argued by the respondent Henwood (brief, pp. 26, 74, 76), who concedes that the Circuit Court of Appeals so construed the bonds (p. 74), but is unwilling to concede that the decision turns upon such a finding (p. 75). This contention is sought to be supported upon two grounds.

First, it is argued that the original issue of the bonds was had in an American economic setting and the parties thought only in terms of dollars. Manifestly such an appeal to extrinsic circumstances could have no effect upon the interpretation of a contract precise and clear in its terms.

⁹*United States v. Ryan*, 284 U. S. 167, 175; *Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Hawaii v. Mankichi*, 190 U. S. 197, 212; *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *United States v. Kirby*, 7 Wall. 482, 486.

If the parties unmistakably contracted for the giving of consideration by the one upon the receipt from the other of a promise to make specified payments in alternative currencies at the promisee's election, it can make no difference to the enforcement of such a contract that the original contracting parties were both Americans. The foreign currency alternatives were factors essential to the creation of an international market for the bonds and helpful in making such a market. The issue of bonds here involved was \$8,155,000 (R. 133) of a contemplated issue of \$100,000,000 (R. 18).⁷ For such a proposed issue it was desirable to add to the market the leading financial capitals, and it is a misconception to assume that the original transaction had no international aspects (Southern Pacific brief, p. 11). The promise to make payments abroad at the option of bondholders certainly gave the transaction an international aspect. Where the Court can see that at the time of making an option contract it was thought possible that at the time fixed for performance one alternative might prove more desirable than another, the contract will be enforced according to its terms. 3 Williston on Contracts (Rev. Ed. 1936), page 2194, § 178.⁸

⁷A further \$13,583,000 aggregate principal amount of bonds authenticated since 1912 by the petitioner, were later issued (R. 135) and are involved in the appeal of Chemical Bank & Trust Company, No. 495, heard herewith.

⁸Among the authorities cited are *Taylor v. Smith*, 25 N. Y. App. Div. 632 (see 24 App. Div. 519, 528), and *Missouri-Edison Electric Co. v. Steinberg Co.*, 94 Mo. App. 543, 68 S. W. 383. *The indenture here in suit was executed by the Debtor and the petitioner in New York (R. 100-3) and by the individual trustee in Missouri (R. 103), and the bonds were authenticated by the petitioner in New York (R. 131).

Second, it is argued that the bonds construed with the mortgage were *primarily* payable in dollars. This matter is discussed at pages 19-24 of our main brief. While respondents rely upon provisions of the mortgage asserted to show that the foreign money alternatives are secondary,⁹ these provisions at most raise a conflict with the unequivocal language of the bonds themselves. The bonds, as we have shown, connect the foreign currency alternatives with the disjunctive *or* and provide for payment at the holder's option at any of the five designated places. The equal and co-ordinate character of the alternatives could not be clearer. The fact that the Debtor is an American national, that holders may be American nationals, that the trustees are American nationals, does not make the debt one payable in dollars until the option for dollars has been exercised by or on behalf of the holder. The provisions of the mortgage relied upon by respondents describe the foreign currency amounts with the words "also to be payable" and the foreign places of payment as places "in addition to the City of New York" (R. 18, 19). But these are merely recitals in the mortgage generally describing the bonds, and do not purport to amend their terms or state them with legal precision. Elsewhere the mortgage affirmatively provides that the Debtor shall pay the bonds "at the dates and the places and in the manner mentioned in such bonds . . . according to the true intent and meaning thereof" (R. 59). Inconsistency, if there were such, in the recitals relied upon by respondents could not survive that express adoption of the terms of the bonds as the true measure of the obligation. Another clause relied upon by respondents is Article First.

⁹R. 18, 19, 38, 39, quoted in Southern Pacific Co. brief, pages 8-9, and in Henwood brief, page 76.

Section 4 of the mortgage (R. 38-9). The language there employed, placing the "option" after the dollar alternative and before the foreign currency alternatives, is obviously accidental and without legal significance as against the bonds themselves. The description in the same section of the *face amount* of the bonds as United States gold coin or the equivalent in foreign currencies "calculated at the rates of exchange stated in the form of coupon bond hereinbefore [i.e., R. 19-21] set forth" means merely that the dollar alternative is taken as the measure for calculation of the foreign currency amounts. The necessity of some such measure to avert an over-issue has already been explained (main brief, pp. 24-5). The selection of dollars as that measure has no more significance than the selection of guilders, marks or sterling would have had; for the number of units of each currency was calculated so as to be equal to the other at the exchange rates of 1912.

(b) The contention that the second sentence of clause (a) is of primary and controlling significance in the interpretation of the Resolution.¹⁰

The respondent Henwood rests his argument principally upon this sentence (brief, pp. 20-38); and the petitioner in Nos. 590 and 591 constructs its case upon this sentence, which it characterizes as "the principal enacting

¹⁰This sentence is: "Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such provision [which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby] is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

sentence of the Resolution" (brief, p. 31).¹¹ Respondents press for an unlimited application of certain words therein, viz., *obligation* and *payable in money of the United States* and *shall be discharged*. It is by their own labors of exegesis upon these words that counsel on the other side of the question have satisfied themselves regarding "the all-inclusive character of the statute's application" (Henwood brief, p. 41) and the "purpose" of Congress "to limit the measure of recovery upon such obligations" (Bethlehem Steel Co. brief, p. 35).

But in fact, in seeking to find the purpose of the legislation by deduction from their own construction of certain enacting language, divorced from the context and from the preamble and from the evidence in the Congressional Debates, counsel have flown in the face of accepted canons of statutory construction. Every part of a statute (such as the second sentence of clause [a]) must be construed in the light of the whole (here including the first sentence and the preamble).¹² The strict letter of the Resolution, if it could be construed to destroy foreign currency alternatives, should yield to its evident spirit and purpose of regulating merely United States currency and its relation to monetary

¹¹The careful and closely reasoned opinion of Circuit Judge Learned Hand is attacked (Henwood brief, p. 53; Bethlehem brief, p. 31) for failure to discuss specifically this second sentence. *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Company*, 81 F. (2d) 11, certiorari denied 298 U. S. 655.

¹²*Helvering v. New York Trust Co.*, 292 U. S. 455, 464; *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89; *Brown v. Duchesne*, 19 How. 183, 194; *Pennington v. Coxe*, 2 Cranch 33, 128.

d.¹³ In case of ambiguity in the enacting clause, doubts may be resolved by reference to the title and the preamble.¹⁴ These rules have decisive significance upon the true meaning of the second sentence of clause (a). The title of the Resolution is "To assure uniform value to the coins and currencies of the United States". The preamble deals exclusively with the holding of or dealing in gold and obligations exacting gold or money of the United States measured by gold, and declares *these, and no others*, to obstruct the power of Congress to regulate the value of money in the United States and to be inconsistent with the Congressional policy to maintain parity among the types of United States currency. The first sentence of clause (a) is specific and limited in its enumeration of provisions declared to be against public policy. They are only such provisions as confer on the obligee rights to require payment

1. in gold,
2. in a particular kind of coin or currency,
3. in an amount in money of the United States measured by gold,
4. in an amount in money of the United States measured by a particular kind of coin or currency of the United States.

the concluding portion of the first sentence, which prohibits their insertion in obligations hereinafter incurred, is

¹³*Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Trinity Church v. United States*, 143 U. S. 457, 459.

¹⁴*Bengzon v. Secretary of Justice*, 299 U. S. 410, 416; *Trinity Church v. United States*, 143 U. S. 457, 462; *S. v. Palmer*, 3 Wheat. 610, 631, per Marshall, C.J.; *Price v. Forrest*, 173 U. S. 410, 427; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 563.

likewise exactly expressed to cover the four types, and only the four types, declared to be against public policy. "No *such* provision" is the scope of this prohibition.

What then is the function of the second sentence immediately following this enumeration of the provisions declared to be against public policy and hereafter prohibited? Is its function to broaden the impact of the Resolution immeasurably out of relationship to its title, its preamble, its purpose, and its constitutional basis in the power of Congress? Obviously, we submit, the answer must be in the negative. It is the first sentence, the preamble, and the title that fix the scope and aim of the legislation. The function of the second sentence is to execute that aim, to implement the policy declared by providing the means of discharge of the prohibited clauses *and of those only*. Were it not for the second sentence, the contention might have been made that any instrument containing a gold clause had been annulled as violative of public policy.¹⁵ The second sentence excludes such a contention by directing that nevertheless a gold clause obligation shall be discharged by payment dollar for dollar in legal tender. The further function of this direction is, as an exercise of the currency power of Congress, to insure the equality of Federal Reserve notes and other currency as units of account with

¹⁵Such was actually the holding of Rosenman, J., in the *Zurich* case, No. 590. Here he declared that, if one alternative method of payment is proscribed by the statute expressly, the entire obligation is covered, and that *both alternatives* contained therein become unenforceable. 164 Misc. 498, 500-1, affirmed 254 A. D. 839, reversed in Court of Appeals on January 11, 1939. This line of argument is no longer pressed by counsel for the petitioner in No. 590, but the respondent Henwood seems still to adopt it in relying on cases such as *Johnson v. Joyce*, 90 Minn. 377 (brief, pp. 69-70).

former gold dollar. Such effect was given to it by the
 ment of this Court in the *Norman* case, 294 U. S.
 t 314.

carry the second sentence further and strive to
 e it as an instrument of discharge entirely beyond
 ope and purpose of the Resolution as set by all its
 elements is, we submit, a plain distortion of the legis-
 intent. The argument of the petitioner in Nos. 590
 91 (brief, pp. 18-19) carries such distortion to the
 ne. Concentrating upon the second sentence, which
 contains 47 words, that petitioner's counsel restate it
 lusion of the definitions elsewhere found in the Reso-
 obtaining a form which comprises 96 words.* They
 y skilful excision reduce it to 20 words. These turn
 be:

Every obligation payable in money of the United
 States shall be discharged upon payment, dollar for
 dollar, in legal tender.

conclude that theirs is the only construction "which
 effect to every word in the Joint Resolution". If that
 we suggest, they have indeed achieved a concentra-
 meaning and an economy of language never hither-
 mined, for they have expressed in 20 words the full
 ng upon which Congress wasted hundreds of words,
 ave reduced to superfluity the preamble, the first
 ce of clause (a), and all the rest of the enactment.

this kind of dialectic it is sufficient to oppose the
 ing of Marshall, C.J., referred to by this Court in
s v. United States, 287 U. S. 435, 446:

"In *United States v. Palmer*, 3 Wheat. 610, 631,
 Chief Justice Marshall, in construing the Act of

Congress of April 30, 1790, § 8 (1 Stat. 113) relating to robbery on the high seas, found that the words 'any person or persons' were 'broad enough to comprehend every human being,' but he concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.' "

(c) The contention that the second sentence is to be construed by systematic enlargement of the operative words to the limit of their meaning.

Thus the argument is that "obligation [payable in money of the United States]" as employed in the second sentence imports the entire instrument embodying the contract, on the ground that a distinction is made in the first sentence between "provision" and "obligation". It is indeed true that the scope of the two words is different. The scope of "provision" must be less than that of "obligation", in order that the former may be contained in the latter. Even if to be taken as the instrument, not the duty incurred, an "obligation" contains various formal clauses, such as recitals, the description of the parties, the *teste*, not properly falling within the meaning of "provision" as defined in the first sentence. *But that is the maximum significance of any distinction between the two in the first sentence.* The fact that the inclusion of "provision" is less than that of "obligation" does not mean that the latter word was conceived by Congress to include much more than it normally includes, *e. g.*, a five-part currency clause of a rare type.¹⁶

¹⁶Unless of course the gold dollar alternative should mature by exercise of an option so as to become the *sole* method of discharge.

The employment of "every" with the word when it recurs in the second sentence does not take it outside the *eiusdem generis* rule; it does not extend its scope, so far as concerns the payment clause, beyond the four types enumerated in the first sentence; it does not make the word mean "all kinds of obligations".

Yet the Court will observe that respondents' contention to the contrary and insistence upon a meaning for "obligation" in the second sentence far broader than anything suggested in the first sentence, is the very essence of their argument. This is so despite the fact that it is conceded in the present case that "obligation" is a word of several legal meanings, that it is often used in a sense embracing more than one of these meanings, and that it is *probably used in two senses* in the Joint Resolution.¹⁷ Moreover both senses (*i. e., debt or instrument*) might be deemed to refer to a single obligation to pay in United States dollars, like that involved in the *Norman* case, or an alternative contract where each alternative is a United States money clause, like that in the *Holyoke* case.

Next, respondents employ for the purposes of this case the most extended meaning of the word "payable". In the direction given by the second sentence for the discharge of every obligation "payable in money of the United States" by payment in legal tender, they insist that the word "payable" means capable or susceptible of payment upon any future contingency, so as to cover multiple currency bonds containing the dollar alternative even though the dollar alternative be not elected and some foreign currency alter-

¹⁷Henwood brief, pages 22, 23.

native be elected. The result so attained is one of those injustices to which would seem applicable the injunction of Brett, M.R., that "a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament."¹⁸ For it is sought thereby to derogate from the strict terms of a contract freely entered into, to deprive one party of a stable value for which he had previously given value, and to do so by means of legislation concededly not based on any "affirmative consideration" by Congress¹⁹ of this special type of contract or without any serious contention that the regulation of United States currency requires it to be stricken down.

Correctly read in the light of the other provisions of the Resolution, the second sentence is instinct with the conception of maturity and payment. The word "payable" imported therein from clause (b) can, as a matter of fair and reasonable construction, have reference only to the state of the contract at the moment of discharge and payment. The verb in the sentence is "shall be discharged", the moment in the life of the contract contemplated by Congress for the operation of the second sentence is "at the time of payment". Admittedly the word "payable" has several definitions. In this context, it can refer only to sums absolutely due and owing after the performance of conditions preced-

¹⁸In *Plumstead Board of Works v. Spackman*, L. R. 1 Q. B. D. 878, 887, quoted with approval in *Hawaii v. Mankichi*, 190 U. S. 197, 214, and *Sarrells v. U. S.*, 287 U. S. 434, 448.

¹⁹Bethlehem Steel Co. brief, page 37; Henwood brief, page 85.

dent, such as options. For this use of the word "payable" in the sense of strictly to be paid rather than permissively to be paid, the precedents are clear. In addition to the cases cited in our main brief, reference may be made to *Cole v. Ross*, 9 B. Monroe 393, 50 Am. Dec. 517 (Kentucky 1856), and *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. 1032, 1034.²⁰

The argument is advanced that *Hodges v. Shuler*, 22 N. Y. 114, and like cases cited by us (our main brief, p. 43, note 16), together with *Hotchkiss v. National Banks*, 21 Wall. 354, sustain respondents' position that the Debtor's bonds were payable in United States money within the meaning of the Resolution before election of any alternative on behalf of the holders, for the reason that these cases hold a note with alternative promises to pay money or deliver a commodity, to be payable in money so as to be negotiable even before maturity. Ingenious as it is, this argument turns upon the precise nature of the contracts involved in those cases. Reference to the opinion in the *Hodges* case, as well as to *Hotchkiss v. National Banks*, 21 Wall. 354; 358, will show at a glance the reason for the conclusion reached. That was that the note was so expressed that the money was absolutely due *unless* the holder should choose the alternative. The note was thus a defeasible promise to pay money, and was a money contract until

²⁰The point made by respondent Henwood that none of the authorities defining "payable" in commercial usage involved alternative contracts, does not seem material. The question is what the word means in connection with dollar obligations, and, even if the respondents are right in construing the Resolution as applicable to alternative contracts, they will concede that it is not *limited* to such contracts.

defeasance by a contrary election.²¹ As the instruments here involved contain equal and co-ordinate alternatives, none of which is owing until elected, the negotiable note cases are not analogous.

The third expression in the second sentence of clause (a) upon which respondents lay extreme and undue stress is "whether or not". In the Resolution as written, the meaning of this phrase is scarcely doubtful. The first sentence of clause (a) had declared to be against public policy certain types of provision. The second sentence provided that every obligation heretofore or hereafter incurred *whether or not* any such provision is contained therein or made with respect thereto, shall be discharged upon payment dollar for dollar in legal tender. The force of "whether or not" in this construction is plain. In a sentence providing that obligations payable in money of the United States shall be discharged upon payment in legal tender dollars, it adds the direction that this shall be so *even if* a gold clause shall appear in the obligation. This Court in effect so stated in *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 339, in paraphrasing the second sentence:

"... every obligation, heretofore or hereafter incurred, *though* it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment." (Italics supplied.)

²¹See 22 N. Y. 114 at 115, 118. The effect of these cases is incorrectly stated at page 43 of our main brief. The second complete sentence from the foot of that page should read: "The reason for this rule is that, unless the holder elects the commodity alternative, the instrument remains one for the payment of money and nothing else."

Counsel on the other side of the question disregard this construction and the plain meaning of the phrase. They extend the phrase in the most extraordinary and unwarranted way. They say it means

"whether or not such 'obligation' contains . . . any other 'provision' for an alternative mode of payment at the option of the obligor or obligee";

"regardless of whether such obligation is *also* payable in a medium other than money of the United States";

"the second sentence . . . prevented the enforcement in accordance with their terms . . . of all 'provisions' calculated to have like effect [with gold clauses];"²²

"irrespective of the other provisions contained therein";

"irrespective of the provisions for payment in Dutch guilders or other foreign moneys".²³

The extent and the gratuitousness of these enlargements upon the legislative meaning require no comment.

The fourth expression in the second sentence of clause (a) upon which respondents rely is "shall be discharged". They properly take these words to be mandatory, commanding or directing discharge of the obligation upon payment in legal tender dollars.²⁴ The result of the application of this mandatory language to a subject-matter which respondents have broadened far beyond the actual intent of

²²Bethlehem Steel Co. brief, pages 19, 20, 46.

²³Henwood brief, pages 13, 21, 84.

²⁴See Henwood brief, page 7—"must be discharged"; Southern Pacific Co. brief, page 26—"command"; Bethlehem Steel Co. brief, page 27—"it is the mandate".

Congress is, as we have shown, absurd and unjust. It means the discharge of contracts containing ordinary dollar and commodity alternatives upon payment of the dollars even though the commodity is elected; compulsion upon the debtor to pay dollars even though he has an option to deliver a chattel of less value or to pay in depreciated foreign money; and the like. Faced with this possibility, the petitioner in Nos. 590 and 591 seeks to retreat. It asserts that the language construed to be mandatory really grants the obligor a "right" or "authority",²⁵ and does not force him to pay the dollar amount if he does not so desire. Presumably this argument is based upon the words "upon payment, dollar for dollar" immediately following the words "shall be discharged" in the second sentence, and the implied contention (although not overtly expressed) is that those words signify "if payment shall be made in dollars, then dollar for dollar", etc.

Any such argument gives away the entire case. It amounts to a contention that Congress deliberately discriminated in favor of debtors and against creditors by taking away the right of election, in option contracts, as regards creditors while preserving it in favor of debtors. Such a construction of the Resolution, if frankly avowed by counsel, would meet at once with the condemnation of the due process clause of the Constitution, as exemplified in *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555. It would be an open abandonment of the constitutional basis in the money power of Congress which has heretofore been held to sustain the Resolution in its impact on the gold clauses.

²⁵Brief of Bethlehem Steel Co., page 28, note 11.

A construction of legislation which turns upon forcing to the limit of their denotation each of the four expressions above discussed, demonstrates its own unsoundness.

(d) The contention that the first sentence²⁶ of clause (a) of Section 1 shows alternative contracts to have been within the contemplation of Congress.

It is pointed out that literally the content of the "provision" at which the first sentence is directed is in the disjunctive. It is argued that, since the "obligation" containing such provision is defined by clause (b) to be one "payable in money of the United States", the draftsman contemplated an alternative contract in which one option should be United States gold dollars and the other might be gold bullion.²⁷ The conclusion reached is that a Congress which contemplated such an alternative contract might well have contemplated a multiple currency alternative contract.

The answer to this contention is very simple. So far as concerns the case supposed of an alternative contract embracing both gold bullion and United States dollars, the gold alternative would according to the facts of the particular case be determined to be either a money clause or a commodity clause. If a money clause, it would be clearly within the Resolution, and the first sentence of clause (a)

²⁶This provides that "every provision contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation [payable in money of the United States] hereafter incurred."

²⁷Henwood brief, pages 83, 84; Southern Pacific Co brief, page 23.

thereof as regards such a contract would deal with alternatives all of which were expressed in United States money. So understood, the first sentence could have no bearing on multiple currency contracts such as are involved in this and companion cases. If construed in the particular case to be a true commodity contract, the gold bullion clause supposed might not be within the Joint Resolution²⁸. Even if not struck down by that legislation, however, it would be made impossible of performance by other legislation, as pointed out in the opinion in the *Holyoke* case, 300 U. S. at 336-7. See also the Government's contention as summarized by the Court in the *Norman* case, 294 U. S. at 298-9. Impossibility of the gold bullion alternative would leave standing the other alternative or alternatives (our main brief, pp. 37-9).

The instrument involved on this appeal is a five-part alternative contract, of which only one branch involves United States money in any form. The other four branches are expressed in foreign currencies. Such a contract is hit by the Resolution in the first branch only. It is beyond dispute that the foreign currency branches, while relating to money *in the place of payment*, can be deemed from the point of view of our law and legislation to relate to a commodity only, for foreign moneys are merely a commodity in this forum.²⁹ The purpose of Congress in prescribing

²⁸See dicta in the *Holyoke* case, 300 U. S. at 339; *Legal Tender Cases*, 12 Wall. 457, 566; *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F. (2d) 166, now awaiting decision following reargument on December 12, 1938.

²⁹Authorities cited at pages 30-1 of our main brief. We may repeat that this distinction in our law between foreign moneys and United States money, underlies all the judicial opinions exempting multiple currency contracts from the

a mode of discharge of obligations payable in United States money, by the second sentence of clause (a), could not under any fair and reasonable construction have extended beyond the United States money clauses to which the first sentence is plainly confined. The clearest error of the Circuit Court in this case is its holding that the foreign currency alternatives also are money and not commodity contracts. 98 F. (2d) at 166.

(e) The contention that, if construed to regulate the mode of alternative performance in foreign countries by cutting off the right to such performance, the Joint Resolution would still not represent an attempt by Congress to give extra-territorial force to American law.³⁰

Part of our adversaries' argument on this point is addressed to the jurisdiction of the courts. We concede that this Court has jurisdiction to construe the terms of a contract between the parties before the Court, who are American nationals, even with respect to clauses dealing with performance in foreign countries. We concede that Congress would have jurisdiction and power to determine a public policy applicable to United States money contracts,

scope of the Joint Resolution. Learned Hand, Cir. J., in *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11; cert. den. 298 U. S. 655, followed in *Zurich General Accident & Liability Ins. Co. Ltd. v. Bethlehem Steel Co.*, New York Court of Appeals, January 11, 1939, our main brief, page 99; Lindley, J., in *McAdoo v. Southern Pacific Co.*, 10 F. Supp. 953, 955, reversed on other grounds 82 F. (2d) 121; Martin, J., in *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 N. Y. App. Div. 634, 644.

³⁰Henwood brief, page 38; Bethlehem Steel Co. brief, pages 29-31.

if found by it necessary to the proper regulation of United States currency, and that such public policy must be applied by our courts regardless of foreign law.


These are the points of the respondents, and they do not touch upon the real objection to their construction of the Resolution from the point of view of the extra-territorial assertion of power. That objection is that the public policy declared by Congress in the premises can be found, upon a fair construction, to relate only to obligations actually coming to be paid in United States currency; that an American public policy concerned with the regulation of United States currency can have no proper concern with foreign currencies payable in foreign countries; and that the attempt to extend the Resolution to reach modes of discharge in foreign currencies leaves the resulting legislative act *pro tanto* outside the Constitutional basis for the exercise of the power of Congress and outside its territorial jurisdiction. Why, indeed, should Congress care about the manner of discharge of a guilder contract? No American public policy can be affected thereby. Cf. *Guaranty Trust Co. v. United States*, 304 U. S. 126, 134, 135. The principle is so plain in the case of a straight guilder contract that respondents make no effort to extend the Joint Resolution to such contracts. With the effect upon American nationals indebted in guilders of the enhanced dollar cost of performance in guilders resulting from the considered Congressional policy of depreciating the dollar, Congress admittedly had no concern. Why should it be affected by the plight of American debtors so indebted in the alternative merely because another alternative of their obligation might be United States gold dollars? Clearly the limit of the interest of Congress in obligations of that character could have been only to provide, as clause (a)

does provide, that neither gold nor an enhanced measure of *dollars* representing gold, shall be exacted of the debtor. Exaction from the debtor of the *original* measure of guilders could not have concerned Congress, even though damages might, in the event of default, be calculated at the enhanced rate of exchange which Congress intended should arise. The Joint Resolution does not envisage defaults. It cannot be construed to fix a measure for damages for breach of foreign exchange contracts. So far as Congress could be imagined to have considered the matter at all, it can only have regarded obligations in terms of foreign currency as remaining constant by the law of the place of payment regardless of its value on foreign markets. *Deutsche Bank v. Humphrey*, 272 U. S. 517, 519. Concededly Congress did not concern itself with straight guilder or other commodity contracts.

The Joint Resolution as respects foreign currency alternatives must be read in the light of the fully established rule that the law of the place of performance, and no other law, determines the measure of performance at that place. *Zimmermann v. Sutherland*, 274 U. S. 253; *Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd.*, [1934] A. C. 122, 151; *Mount Albert Borough Council v. Australasian Temperance etc. Society*, 54 T. L. R. 5; *Rex v. International Trustee*, [1937] A. C. 500, 555.

(f) The contention that, despite the avowed purpose of Congress to depreciate the dollar and its consequent realization that the foreign currency obligations of all American nationals so indebted would be proportionately increased in terms of the dollar, Congress nevertheless singled out for protection against such increase the narrow class of debtors represented by respondents here and petitioner in

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Nos. 590 and 591, while ignoring the precisely similar plight of all other American nationals indebted in foreign currencies, particularly importers of raw materials.

Counsel on the other side of the question are perfectly clear that an essential purpose of the Joint Resolution was to permit partial repudiation by Americans obligated upon foreign currency contracts containing a United States money clause.³¹ This conclusion is rested upon an argument against "discrimination" between Americans indebted in foreign currencies and Americans indebted in dollars. No effort is made to justify the discrimination which, if respondents are right, would be worked between Americans indebted in foreign currencies with an alternative United States money clause and Americans similarly indebted without such a clause. Where, as in the instant case, the United States money clause entirely failed of effect because not elected, no difference of substance whatever exists between the two classes. Manifest is the unsoundness of the argument leading to such an anomalous result. No answer has been found by counsel on the other side of the case to the reasoning of Judge Hand on the point:

"When we went off the gold standard, we added that burden to many other undertakings than those to pay foreign money; that was the result whenever an American obligor could not procure his performance in the United States. If he must buy it with dollars abroad, he was handicapped precisely as the defendant is here. Certainly the resolution cannot by the utmost latitude be stretched so far as to relieve such obligors, and while it is impossible to

³¹Henwood brief, pages 19-20, 35-6; Bethlehem Steel Co. brief, pages 44-5.

know how many citizens were so affected, we should have no warrant for supposing that they were insignificant in number or importance. Equally we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else."³²

The same considerations furnish the answer to the complaint of Southern Pacific Company (brief, pp. 16-19) that our construction of the Joint Resolution effects an unconstitutional discrimination against creditors, like Southern Pacific Company, holding straight gold clause bonds. That respondent speaks of "the parity" between such bonds and the multiple currency bonds here involved. Why there should be a parity between them as matter of law is not obvious. The difference of form is of crucial importance so far as concerns the Congressional power to regulate United States money; the gold clause bonds held by the Southern Pacific Company are an absolute and unconditional interference with the regulatory power of Congress, while the alternative instruments represented by this petitioner offered at most a threat of such interference, contingent upon the election of the gold clause, a threat which has disappeared by the discarding of that alternative. Upon the discarding of that alternative the Congressional purpose so far as concerns the regulation of the United States currency was accomplished.

³² *Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, 12, cert. den. 298 U. S. 655.

B. As to respondent Henwood's alternative grounds for affirmance.

The respondent Henwood, unwilling to rely wholly upon the single ground of the decisions below, advances three further objections to petitioner's proof of claim in guilders, which, though advanced below, were neither accepted nor rejected by the lower courts. The Circuit Court thought the "outstanding controversy" to be that raised by the Joint Resolution. 98 F. (2d) at 162.

Respondents' objections not having been passed upon below, it is our understanding of the practice of this Court that they will not be decided here in the first instance.³³ The Debtor's trustee requests that they be decided here in the first instance. As the proceeding is one in reorganization, the petitioner as trustee for bondholders concurs in the belief that a single determination of all questions connected with its proof of claim is desirable; and, upon the understanding that the respondents have here presented all such questions as they desire to raise, the petitioner makes no objection to their consideration at this time.

³³*Guaranty Trust Company v. U. S.*, 304 U. S. 126, 144; *Schriber Co. v. Cleveland Trust Co.*, 305 U. S. 47, 61. In the cases relied upon by the respondent Henwood for its claim to review here matters not considered below (brief, pp. 10-11), it appears that the point desired to be reviewed was actually decided below. It is true that the two principal further objections now sought to be raised by the respondent Henwood were raised in the response (pp. 7-8) to the petition for certiorari. We do not question that this Court has power even upon certiorari to base its decision on any ground supported by the record.

1. The petitioner as Mortgage Trustee had power by law and by necessary implication from the indenture to elect the most advantageous currency for bondholders who failed to elect.

The necessity of an election of one of the five currency alternatives in these bonds flows from the nature of these alternatives (elsewhere discussed) as equal and co-ordinate among themselves. Until such an election be had, the amount due will not be fixed, the claim cannot be proved, and the reorganization cannot proceed. So much was clear to the Circuit Court of Appeals, which said on a prior appeal:

"No intelligent action of a final nature can be taken in this proceeding until the claims of creditors under the First Terminal and Unifying Mortgage bonds are fixed in amount. The promise to pay is in several alternatives, and it cannot be known definitely what the amount due on these bonds is until the claims are filed and approved."³⁴

The foreign currency options and the gold dollar option alike are granted by the bond (R. 19) and the mortgage (R. 38) to the "holders" of the coupon bonds. This word is the principal basis of the respondent Henwood's argument on the point (brief, pp. 96-114). Yet it is manifest that a right granted to a bondholder need not be exercised by him *in propria persona* but may be exercised by an agent or trustee like any other right. Inherent in the structure of the mortgage here involved is the power and duty of the Mortgage Trustee to exercise the option under the circum-

³⁴*Guaranty Trust Company v. Henwood*, 86 F. (2d) 347, 53, cert. den. 300 U. S. 661.

stances here presented after giving every facility (as this petitioner did) to individual bondholders to make their own choice.

The facts of the election are clear. Default in interest payment on the bonds occurred January 1, 1936 (R.159). Non-payment continuing for three months constituted an event of default under the mortgage (R. 66-7). The rise of such an event permitted an acceleration of maturity of the bonds. The mortgage conferred the right of acceleration upon the petitioner as trustee (R. 69-70). Upon the completion of the event of default the petitioner therefore began preparations to accelerate the maturity. On April 11, 1936, the Debtor filed its petition in the District Court to enjoin the acceleration, and the injunction was granted on May 5, 1936, but reversed by the Circuit Court of Appeals (R. 135-6). This Court denied certiorari, and the order on remand dissolving the injunction was not made until February 24, 1937. Thereupon, pursuant to the order, the petitioner served notice of acceleration as of May 5, 1936 (R. 136).³⁵

³⁵Since the notice of election was given in Amsterdam on September 24, 1936 (*i. e.*, just a week before proofs of claim had to be filed, so as to give the maximum time to bondholders to make their individual elections if they so desired), the ante-dating of the acceleration made necessary by the injunction proceedings creates the appearance of the election occurring almost five months after maturity. Actually the notice of election as of May 5, 1936, was served on February 25, 1937 (R. 136), and the order on the mandate gave the petitioner the choice of those two dates only (R. 197). Respondents have always sought to take some technical advantage of this artificial sequence of dates, and one of their briefs in this Court contains a statement on the subject which is misleading in the absence of the surrounding facts (Hewood brief, p. 103, note).

In the meantime the petitioner proceeded with the necessary steps for election among the various currency alternatives. Notice of its intention to elect guilders on behalf of bondholders who should not make their own election, and file a proof of claim on a guilder basis was published by petitioner on June 4, 1936.³⁶ The latest date set for the filing of proofs of claim was October 1, 1936 (R. 194-5). After giving the utmost opportunity to individual bondholders consistent with the near approach of this date, the petitioner on September 24, 1936, made its election of guilders on behalf of the bondholders who had not acted for themselves, by formal demand and protest in Amsterdam, and filed a proof of claim on that basis.³⁷

The election thus made was an exercise of power conferred upon the trustee by necessary implication from express provisions of the mortgage, as well as by the Bankruptcy Law and the orders of the District Court.

As has been seen, election among the five currency alternatives was a prerequisite to the ascertainment of any amount due. The mortgage contains the Debtor's covenant to pay to the petitioner as trustee for the benefit of bondholders the whole amount which shall have become due and payable on the bonds and coupons "upon demand of the Trust Company" (R. 76). The Trust Company is empowered to recover judgment "in its own name and as trustee of an express trust". This clause contemplates a maturity arising upon an acceleration of the bonds by the Mortgage Trustee's action, as authorized by the mortgage (R. 69-71), as well as the regular maturity of the bonds. The notice

³⁶R. 179. See the statement at pages 9-10 of our main brief.

³⁷See the statement at page 10 of our main brief.

of acceleration was delivered by the trustee as of May 5, 1936 (R. 136). The consequent proceedings of the trustee on behalf of bondholders, therefore, constituted an exercise of the express powers referred to, since it was the trustee, not the bondholders, to whom the Debtor had covenanted to make payment in an event of default. It is obvious from what has been said that the right of selection of the appropriate currency alternative in the bonds is an immediate and inevitable inference from the powers so expressly conferred. Those powers would be nugatory without that right.

Connected with these provisions for demand of the principal and interest by the trustee upon acceleration is a group of related provisions in the mortgage conferring upon the trustee rights of action at law and in equity and a power of sale, and making provision for the disposition of purchase money received by the trustee (R. 69-74). While the objection is made (Henwood brief, p. 98) that the portions of the mortgage relied on are restricted to proceedings in equity, a judgment, and sale upon default, it is apparent from reference to the acceleration clause and the Debtor's covenant to pay, already mentioned, that the petitioner's inherent power of election under the mortgage is by no means confined to any particular form of proceeding. On the contrary the express powers conferred are in aid of a purpose to enforce the rights of bondholders by a suit or suits in equity or at law of any kind including "any other appropriate legal or equitable remedy" as the petitioner shall be advised to be most effectual in protecting and enforcing the rights of bondholders (R. 71). As against the objection that bankruptcy forbids the judgment and sale on default mentioned in the mortgage (Henwood

brief, p. 98), we need only note that proceedings under § 77 partake of the principles of equity receivership as well as of bankruptcy. Finletter, *Principles of Corporate Reorganization* (1937), pages 1-3; Bankruptcy Act § 77(b) and (1), 11 U. S. C. A. § 205(b) and (1).

Section 77(c)(7), 11 U. S. C. A. § 205(c)(7), expressly authorizes mortgage trustees to file claims on behalf of bondholders

"in which event it shall be unnecessary for the holders of such bonds or securities to file claims in their own behalf"⁸⁸

In this proceeding the District Court, under authority of the statute, authorized this petitioner as trustee of the bonds here involved to file its claim by October 1, 1936 (R. 195) on behalf of the securities outstanding under the mortgage, and expressly directed that the claim so filed should be "for the account and benefit" of the bondholders and that it should thereupon "be unnecessary for the holders of the securities to file claims in this proceeding in their own behalf" (R. 193-4). So well understood was the representative character of the petitioner that respondent Henwood actually opposed an attempt of a bondholder to intervene in the reorganization, with the statement that the Mortgage Trustee "has the right to represent the interests of all bondholders thereunder" (R. 188).

⁸⁸The only exception is that the mortgage trustee is not constituted by the statute the representative of bondholders for the purpose of accepting or rejecting plans of reorganization. The statement of this exception indicates the wide extent in other respects of the power granted mortgage trustees by the act.

So far as concerns the question of this petitioner's right to elect for bondholders, the meaning of the mortgage and statutory provisions just summarized is in our submission perfectly clear. The Mortgage Trustee could not fulfill its statutory power and duty of filing a claim upon the Debtor's bonds for the bondholders so as to make unnecessary the filing of their individual claims, unless it could exercise for them the indispensable right of election so far as not exercised by them individually; for the election is the inescapable condition precedent to the ascertainment of any amount due, which in turn is the condition precedent to the fixation of the claim and the preparation of a reorganization plan. The respondent Henwood's contention to the contrary is directed to the object of procuring a default of election by the great majority of bondholders, so that he may himself elect a currency less advantageous to them.

Our conclusions are supported by well-established principles and the increasing tendency to unitary representation by the mortgage trustee in bankruptcy proceedings. It is unnecessary to extend this brief by discussion of the authorities.⁸⁹ The cases relied upon by the respondent Hen-

⁸⁹Mortgage trustees are appointed to protect the rights of scattered and uninformed bondholders. *Farmers Loan & Trust Co. v. Central Railroad of Iowa*, 8 Fed. Cas. No. 4663 at p. 1040; *In re International Match Corp.*, 3 F. Supp. 445, 449. Where, as in the present case, the mortgage contains a covenant running directly to the trustee, in addition to the promise in the bonds themselves, there are two distinct obligations evidencing a single debt. *In Re International Match Corporation*, 3 F. Supp. 445; *In Re United Cigar Stores Co.*, 68 F. (2d) 895. The authority of the trustee under the mortgage includes all powers which are necessary or appropriate to the carrying out of its duties. Restatement, Trusts, § 186,

wood, such as *Blumgart v. St. Louis-San Francisco R. Co.*, 94 F. (2d) 712; *Bitker v. Hotel Duluth Co.*, 83 F. (2d) 721, and *In re Allied Owners Corporation*, 74 F. (2d) 201, are wide of the point here involved. In these situations the court sought merely to protect represented bondholders against interference with their choice by the mortgage trustee, and used no language which could bear upon the right of the mortgage trustee to act for the benefit of any unrepresented bondholders, as petitioner seeks to do. In the *Blumgart* case, although the present question did not arise, the court said that bondholders seeking to intervene might file their claims upon their bonds unless the trustee under the mortgage did so for all bondholders, and recognized "the practical consideration of the desirability of a unitary representation of the bonds in a reorganization proceeding". 94 F. (2d) at 717. Other cases relied upon by the respondent Henwood arose under instruments not at

Comment (d); Pomeroy, *Equity Jurisprudence* (4th ed.), Vol. 3, p. 2428; Restatement, Agency, §§ 34, 35; *Le Roy v. Beard*, 8 How. 451, 467; *Ventress v. Smith*, 10 Pet. 161, 169. Instances of such included powers are found in *Lane v. Equitable Trust Co.*, 262 Fed. 918, cert. den. 252 U. S. 578; *Continental Equitable Title & Trust Co. v. National Properties Co.*, 273 Fed. 967, approved in *Fidelity-Philadelphia Trust Co. v. Hale & Kilburn Corp.*, 24 F. Supp. 3, 10, 11. Independently of the provisions of the trust indenture, a trust relationship exists between the mortgage trustee and the bondholders. *New York Trust Co. v. Michigan Traction Co.*, 193 Fed. 175, 180; *Old Colony Trust Co. v. City of Wichita*, 123 Fed. 762, 767, affd. 132 Fed. 641; *Marshall & Isley Bank v. Guaranty Inv. Co.*, 213 V. S. 415; *State v. Comer*, 176 Wash. 257, app. dis. 292 U. S. 610. The trustee may thus take proper measures to protect the bondholders in respect to matters not provided for by the indenture. *Frishmuth v. Farmers Loan & Trust Co.*, 95 Fed. 5, 8, affd. 107 Fed. 169.

all comparable to the mortgage here. *In re Prudence Co. Inc.*, 22 F. Supp. 264, and Gerdes on Corporate Reorganization, §1124, relied upon by that respondent (brief, p. 107), actually adopt a position opposite to that taken by the respondent, for they recognize the mortgage trustee as a creditor in proceedings under §77-b whose claim is subject to reduction to the extent that bondholders file individual claims. Cf. *Anglo-California Nat. Bank of San Francisco v. Klein*, 162 Misc. (N. Y.) 898, 911, 912. This petitioner's proof of claim is likewise subject to reduction (R. 5).

The argument that the election of guilders represents an exercise of individual discretion or business choice which must needs be left to the individual bondholders, and could not properly be exercised by a mortgage trustee on their behalf is a palpable red herring. The proposition undoubtedly the freest from dispute in this and the companion cases is that the election of guilders or of Swiss francs is definitely to the advantage of the bondholders. It alone insures that return of fixed value for which they contracted and to which they are entitled.

2. The exchange value of the guilders due from the Debtor in Amsterdam upon demand on September 24, 1936, should be determined at the rate of exchange at the date of the Debtor's petition which is the same as the rate on September 24, 1936.

The District Court found upon the stipulated facts that the rate of exchange of the guilder alike at the time of filing and approval of the Debtor's petition on May 5, 1936, the date of acceleration (which did not, however, fix the currency of payment), and at the time of Guaranty Trust

company's demand in Amsterdam for guilders, was 0.6778 (R. 140). The exchange value after those dates was somewhat lower, being \$0.5560 at the date of the parties' stipulation (R. 140).

The respondent Henwood contends for a rate of exchange as of some date other than the date of breach or the filing and approval of the petition (brief, pp. 114-36), and refers to this Court's adoption of the judgment-date rule in *Deutsche Bank v. Humphrey*, 272 U. S. 517. We submit that that rule is inapplicable to a proceeding in bankruptcy and particularly inapplicable to the question of damages for breach of a contract executed in New York, where the breach-date rule is applied, and where the parties actually contemplated that the exchange value of the foreign currency alternatives should be paid if the currencies themselves were not paid upon demand abroad.

(a) The *Deutsche Bank* case dealt with the asserted liability of the defendant Deutsche Bank in respect of a mark deposit in Berlin.⁴⁰ In his carefully reasoned opinion for the majority Mr. Justice Holmes rested the determination of the date for conversion of the marks into dollars, upon the exclusively foreign situs of all the elements of the contract. He pointed out (pp. 518-9) that at the date of demand the German bank owed no duty to the plaintiff under our law and was not subject to jurisdiction here. He reasoned that the measure of liability imposed by American courts could be only the measure of liability imposed by German law, which could be ascertained only at the moment of judgment. Four justices dissented from that decision,

⁴⁰This is shown by the report below, 7 F. (2d) 330, 351, where the facts are more fully stated.

pointing out that the great weight of authority supported the breach-date rule and holding that the breach-date rule should be applied even under the peculiar facts of that case. Where the facts indicated an American situs for any element of the obligation, this Court in a unanimous opinion by Mr. Justice Holmes applied the breach-date rule as the proper rule of American law. *Hicks v. Guinness*, 269 U. S. 71.

The instant case is one to which the reasoning of *Deutsche Bank v. Humphrey* does not apply and the reasoning of *Hicks v. Guinness* does apply. All the incidents of the contract, except the place of discharge thereof in Amsterdam pursuant to the petitioner's election, had their situs in this country. Here the debtor is situated, here the contract was executed. The dollar alternative was expressed to be payable in New York (R. 19). In connection with the mortgage the parties, as their contemporary correspondence shows (R. 172-3, 133), expressly contemplated payment in this country of the foreign exchange value of guilders in so far as the guilders should not be supplied by the Debtor itself. The Debtor at no time kept an office or agent for the service of the bonds in Amsterdam (R. 132). The main office of Guaranty Trust Company of New York is the only agency ever designated by the Debtor for payment on its bonds (R. 132). At the time of the petitioner's demand and protest for non-payment in Amsterdam, the bondholders had been enjoined by the District Court from proceedings against the Debtor (R. 183).

Under these circumstances, it seems to us clear that the rationale of the *Deutsche Bank* decision is out of place, and that the breach-date rule for conversion of the foreign currency should govern. That is the rule applied by the

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of New York, with which the Debtor's contract was connected at so many points, as above remarked. *Hoppe v. Anglo-Asiatic Bank*, 235 N. Y. 37; *Sokoloff v. National City Bank*, 250 N. Y. 69, 82; *Parker v. Hoppe*, 257 N. Y. 341; *Kantor v. Aristo Hosiery Co.*, 222 A. D. 502, affirmed 248 N. Y. 630. In the absence of the special circumstances envisaged by the *Deutsche Bank* case, this Court applies the breach-date rule. *Sutherland v. Mayer*, 187 U. S. 272, 295; *Hicks v. Guinness*, 269 U. S. 71, 80. The inconveniences and speculations pointed out as a reason for the adoption of that rule in *Hicks v. Guinness* at page 80 by the minority in *Deutsche Bank v. Humphrey* at page 500 are specially applicable to a proceeding in bankruptcy where the creditors have been deprived of their remedy at law by an injunction bringing the debtor's property under the protection of the Court.⁴¹

The value of the guilder at the date of breach, as we have mentioned, was the same as its value at the date of the filing of the Debtor's petition herein.

(b) In bankruptcy the date of the filing of the petition is the proper date for the conversion into dollars of damages resulting from a liability expressed in foreign moneys. That is the moment of the transition of the bankrupt's assets into the custody of the trustee *in custodia legis*. It has been generally considered by the bankruptcy courts that at that moment there vests in the

In a careful study of the question by Osmond K.unkel, *Foreign Moneys in Domestic Courts*, 35 Col. L. Rev. 360, 385, 389, it is pointed out that on principle and authority the value of foreign exchange at the time the cause of action arose should apply in international transactions, including among other cases where the contract was not to be performed in the country of its execution.

bankrupt's creditors as *cestius que trustent* an equitable estate in his property measured in each case by the ratio of the provable claim at that moment to the entire body of provable claims. *Board of County Commissioners v. Hurley*, 169 Fed. 92, 94, 95.⁴² The governing principle is that of an equitable estate or trust fund created for the benefit of creditors and constituted by the estate of the insolvent at the moment of insolvency. *McDonald v. Williams*, 174 U. S. 397; *Price v. U. S.*, 269 U. S. 492, 502; *Merrill v. National Bank*, 173 U. S. 131, 143, 147. See also *Ticonic Bank v. Sprague*, 303 U. S. 406, 411; *In re Portage Rubber Co.*, 296 Fed. 289, 291, certiorari denied 266 U. S. 604. In bankruptcy the filing of the petition is the crucial act which fixes the line of cleavage with respect to the rights of all parties. *White v. Stump*, 266 U. S. 310, 313.

In the application of these principles, the courts have adopted the date of receivership as fixing the measure of damages with respect to liability of the insolvent on sterling contracts. *Claim of Produce Brokers Co. Ltd.*, 286 Fed. 281, 282; *In re Banco Nacional Ultramarino*, 296 Fed. 882, 886. While it is true, as respondent Henwood points out (brief, p. 133), that these decisions were made before the decision in the *Deutsche Bank* case, they nevertheless rest upon the special conception of the creation of a trust fund for the benefit of creditors and the date of that event as the date for the fixation of claims. *Samuels v. E. F. Drew*, 292 Fed. 734, 736, decided in the receivership in

⁴²The opinion of Judge Sanborn in this case was approved in *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 308, and *Sexton v. Dreyfus*, 219 U. S. 339, 344. Though cited by us below, this case is not noticed in respondent's briefs.

which the sterling claims were filed. That conception is recognized by Mr. Justice Holmes in his opinion in *Sexton v. Dreyfus*, 219 U. S. 339, 344.

Cases relied upon by the respondent Henwood, such as *In re Marshall's Garage*, 63 F. (2d) 759 (brief, pp. 27-9), discuss the difference between the value of performance at the date of bankruptcy and the value of performance at the time stipulated in the contract, in complicated and distinguishable situations. In the present situation, the Mortgage Trustee has pursuant to the contract fixed the time for performance at May 5, 1936 (p. 30 above), as well as fixing the medium of performance upon September 24, 1936; and it is stipulated that the exchange value of the dollar on both those dates and at the date of filing the petition was the same (R. 140). Since none of the authorities cited by respondent in this particular connection involve foreign exchange contract, further discussion of the interesting principles developed by them would seem unjustified.

(c) The respondent Henwood is unable to suggest a satisfactory date for measuring damages in respect of a bankrupt's foreign exchange liability, other than the date of filing the petition so strongly supported by principle and authority. In the Circuit Court that respondent contended for the date of approval of the respective claims as an alternative. As against that it was pointed out that such a rule would, in the event of a fluctuating exchange, give disproportionate importance to the date of filing and allow- ing claims. The result would be to give creditors of the same class unequal shares in the debtor's estate in accordance, not with equitable principles, but with fluctuations of the exchange rate and variations in the dates of allowance.

Moreover, the expedition essential to reorganization proceedings would be seriously interfered with by the delay incident to the litigation of exchange value questions upon the merits of separate claims. *Cf. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific R. Co.*, 294 U. S. 648, 685.

In this Court, the respondent Henwood in effect abandons the position taken below and in his protest (R. 111). While adhering to that proposed rule for "ordinary bankruptcy proceedings", he now believes that in reorganization proceedings the rate of exchange as of the date of adoption of a reorganization plan "is the only proper rate to apply" (brief, p. 136). The result is to give the bankruptcy courts two rules to work with, one applicable in what is called ordinary bankruptcies and the other applicable in reorganization proceedings. But with the new rule proposed by the respondent Henwood a further and insuperable difficulty exists. Upon claims of the character here involved, their amount cannot be determined until the rate of exchange has been fixed. Yet no plan of reorganization can be adopted until the claims of creditors have been qualified by filing and allowance to vote thereon. This consideration has already been found by the Circuit Court of Appeals fatal to the Debtor's attempt to enjoin the acceleration of these bonds. *Guaranty Trust Company of New York v. Henwood*, 86 F. (2d) 347, 353, 354, certiorari denied 300 U. S. 661. It seems to us likewise fatal to the adoption of the date of approval of a reorganization plan as the date for the ascertainment of claims expressed in foreign exchange.

3. The suggested application of the Missouri Constitution and statutes is without merit.

At page 66 of his brief the respondent Henwood refers to the Constitution of the State of Missouri, Article XII, Section 8, and Revised Statutes of Missouri (1929) § 4546, declaring void any fictitious increase of indebtedness of Missouri corporations. He concedes (brief, p. 67) that under these provisions a Missouri corporation could issue its bond for \$1,000 or could issue its bond for 2,490 guilders, in consideration of the receipt of \$1,000 in either instance. But he suggests that the Constitution and statutes do not prohibit a Missouri corporation from issuing in consideration of \$1,000 its obligation to pay *either* of the currencies upon the bondholder's demand. This suggestion, or it is hardly a contention, rests essentially upon the value of the guilder-option "as it turned out" (brief, p. 68), for it is common ground that at the date of issuance of the bonds all the options were of the same value (R. 39). As a matter of principle it is plain that the validity or invalidity of the bond issue here involved, under the statutes and constitution of Missouri, must be determined at the time of issue. The Missouri courts so hold. *Bondurant v. Raven Coal Co.* (Mo. App. 1929, not officially reported), 5 S. W. (2d) 566, 575, followed by the Eighth Circuit Court of Appeals in *Slupsky v. Westinghouse Electric & Mfg. Co.*, 78 F. (2d) 13, 17. If the multiple currency alternatives in these instruments were valid under the law governing the Debtor's powers at the time of issue, they could not have been put *ultra vires* by supervening economic changes. The purpose of the provisions of law cited by the respondent Henwood was merely to insure that the trans-

action resulting in the issuance of corporate securities be real and not a fictitious one. *Memphis & Little Rock R. Co. v. Dow*, 120 U. S. 287, 298; *Planters Operating Co. v. Commissioner of Internal Revenue*, 55 F. (2d) 583, 584; *Kemmerer v. St. Louis Blast Furnace Co.*, 212 Fed. 666; *Firth Co. v. South Carolina Loan & Trust Co.*, 122 Fed. 569, 574.

CONCLUSION

The decree of the Circuit Court of Appeals affirming the order of the District Court should be reversed. The respondents having submitted the entire case in the interest of expediting reorganization, this Court should take jurisdiction of the whole controversy and direct the approval of petitioner's claim in the full amount thereof.

Respectfully submitted,

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